

IN THE
SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1945

No. 324

GLOBE INDEMNITY COMPANY, *Petitioner,*
v.
GULF PORTLAND CEMENT COMPANY, *Respondent*

RESPONDENT'S REPLY TO PETITION FOR
WRIT OF CERTIORARI

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Statement

Petitioner's statement as to the nature and result of this case is substantially correct, except its conclusions (frequently stated as fact) that the Circuit Court of Appeals disregarded Texas law and that the Trial Court followed Texas law are incorrect. The pertinent language of Globe's policy has never been construed by a Texas Court and both Courts below were obliged to decide a novel point in the light of analogous decisions. As far as the opinions reflect, the Circuit Court cites 50 per cent Texas State cases (R. 157),

and the Trial Court 40 per cent Texas State cases (R. 30-32).

It is not contended by Petitioner that the judgment of the Circuit Court is in conflict with that of any other Circuit Court of Appeals, or involves a question of Federal Law.

Answer to Jurisdictional Statement

Petitioner, Globe Indemnity Company, seeks the granting of a writ solely on the basis of its erroneous contention that two intermediate Texas Courts have previously held differently with respect to the language of the indemnity policy here in question. Both of these cases were cited to the Circuit Court and are readily distinguishable both on facts and wording used. Neither case was ever affirmed by the Supreme Court of Texas or even approved by the Refusal of a Writ of Error.

The policy in OCFAN ACCIDENT AND GUARANTY CORP. v. NORTHERN TEXAS TRACTION COMPANY, 224 S.W. 212, did not exclude injuries *"caused by work done by an independent contractor,"* but rather *"caused by * * * cars propelled by * * * electricity * * * unless such bodily injuries or death are proximately caused by the performance of work undertaken by Stone & Webster Engineering Corporation."* It will thus be seen that although the words "caused by the performance of the work" appear in an exclusion clause, they were really a limitation upon the excluded risk and therefore were construed liberally in favor of the insured the same as the general coverage clause. In substance the Court held it was obviously not intended to cover all injuries caused by electric cars during and by reason of the performance of the work, but only those injuries having no relationship to the work, for otherwise the "unless" clause would be meaningless. The Court found the language used ambiguous and construed the ambiguity to allow the insured

a recovery, for this is the settled Texas rule. *UNITED SERVICE AUTO ASS'N v. MILES*, 161 S.W. (2d) 1048 (Tex. Com. App.); *DAVIS v. NATIONAL CASUALTY CO.*, 175 S.W. (2d) 957 (Sup. Ct. of Tex.). However, this could be no authority where Petitioner seeks to have its policy construed so as to defeat a recovery, for as an exclusion from the coverage the language would be strictly rather than liberally construed.

JUDGE ALEXANDER, now Chief Justice of the Supreme Court of Texas, in the case of *DORSEY v. FIDELITY UNION CASUALTY CO.*, 52 S.W. (2d) 775-776, properly interpreted the rather muddled holding in the *TRACTION COMPANY* case as follows:

"In each of these cases the Court held that where the employee was so injured while performing such work, the injury was the RESULT of the doing of the work, even though it was CAUSED BY the negligence of a third party, the street car motorman."

The policy involved in *PANHANDLE STEEL PRODUCTS COMPANY v. FIDELITY UNION CASUALTY CO.*, 23 S.W. (2d) 799, excluded injuries "*caused by any horse, draft animal or vehicle owned, hired, maintained or used by the assured, or caused by any person while in charge thereof.*" An employee Lewis was in charge of the truck from which the steel beam was being unloaded at the time the injured person was struck. The court held Lewis' negligent act in unloading the truck was the cause of Mrs. Godley's injury and so within the exclusion clause of the Federal Surety Company policy (upon which no recovery was being sought in the case), in order to hold Fidelity Union Casualty Company on its policy which excluded an injury covered by any other policy held by the insured.

In both cases recoveries were allowed the insured against

the insurers. Neither case involves either facts or policy wording similar to that of this case. The Federal Circuit Court below properly exercised its own intelligence in deciding this case, because (1) there was no State Court case on the point, and (2) a case which involves one contract does not control a case involving a different contract. *SULZBACHER V. TRAVELERS INS. CO.*, 137 F. (2d) 386 (C.C.A. 8th); *MARYLAND CAS. CO. V. CASSETTY*, 119 F. (2d) 602 (C.C.A. 6th).

Lastly, and the controlling point as held by the Circuit Court of Appeals, *THE GLOBE INDEMNITY COMPANY'S LIABILITY TO REIMBURSE RESPONDENT INSURED FOR ALL AMOUNTS EXPENDED BY IT IN THE DEFENSE OF THE FIVE DAMAGE SUITS, MUST BE DETERMINED FROM THE ALLEGATIONS OF THE PETITIONS FILED BY THE VARIOUS PLAINTIFFS IN THE DAMAGE SUITS. MARYLAND CASUALTY CO. V. MORITZ*, 138 S.W. (2d) 1095 (Tex. Civ. App., writ refused); *U. S. F. & G. CO. V. BALDWIN MOTOR CO.*, 34 S.W. (2d) 815 (Tex. Com. App.).

In the agreed typical petition (R. 37, et seq.) it is alleged that Doty Lancon went upon the premises of the Gulf Portland Cement Company as an invitee, and that *while* working there he was killed by a contact in some manner being formed between the machine on which he was working and the high voltage electric line used to operate the cement plant, and that the negligent acts of the Cement Company (the Insured) in (1) failing to warn him, (2) in failing to cut off the electric current, (3) in failing to request the current be cut off, (4) in failing to have an experienced electrician present, and (5) in failing to insulate the wires, were THE DIRECT AND PROXIMATE CAUSE OF HIS (LANCON'S) INJURIES.

The Plaintiffs nowhere alleged that any act or omission of Ole Peterson, or the work he was doing, either directly or indirectly caused the injuries to Doty Lancon. The only

reference to Peterson's work was by way of explaining Lancon's right to be upon the plant premises as an *invitee* rather than as a *trespasser*.

The Petitioner Insurer in this suit contends, and the Trial Court erroneously concluded, that the electrical accident was caused by Ole Peterson's negligence rather than that of the Cement Company. That would have been a proper contention for Globe to make in defending its Insured in the damage suits, *but not in this suit where Globe's liability to its Insured must be determined from what the injured Plaintiffs contended and alleged.*

The policy sold by Petitioner to Respondent purported to cover all injuries suffered, or alleged to have been suffered, at the Respondent's premises by "*any person*" caused by the "*operations of the work*" of cement manufacturing. It excluded from such "persons," employees of the Insured. IT DID NOT EXCLUDE INDEPENDENT CONTRACTORS NOR THEIR EMPLOYEES, NOR PERSONS ENGAGED IN NEW CONSTRUCTION WORK. Nor did it exclude injuries caused by electric power lines owned, maintained or used by the assured, or caused by any person while in charge thereof—as in the PANHANDLE case. Now that a loss has occurred, it ill becomes Petitioner to try to extend the exclusions of its policy to avoid losses it did not see fit to clearly except at the time it wrote its policy and sold Respondent.

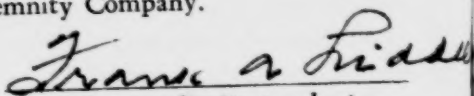
The Circuit Court of Appeals followed the law of this case as declared by the Supreme Court of Texas in the several opinions cited above, and decided that the facts of the following cases were more pertinent than those cited by Petitioner:

U. S. F. & G. Co. v. Breslin, 49 S.W. (2d) 1011 (Ky.);
Maryland Casualty Co. v. Scharlack, 115 F. (2d) 719
(C.C.A. Tex.);

Standard Accident Ins. Co. v. Thompson, 161 S.W. (2d)
786 (Tex. Com. App.);
John Alt Furniture Co. v. Maryland Cas. Co., 88 F.
(2d) 36 (C.C.A. 8th).

Conclusion

WHEREFORE, Respondent, Gulf Portland Cement Company, respectfully prays that a Writ of Certiorari be denied to Petitioner, Globe Indemnity Company.



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